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# Labor Law—Labor Management Relations Act—Unfair Labor Practices— Breach of the Duty of Fair Representation.--Local 12, United Rubber Workers v. NLRB

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act are defeated. As the Board has noted in a comparable context, "Whatever may be lost in maximum industrial efficiency . . . is more than compensated for by the gain in industrial democracy . . . ."[53] If section 9(c)(3) is to be construed as prohibiting collective bargaining for one year after an election lost by the union, this mandate should issue from Congress and not through judicial legislation.[54]

RUTH R. BUDD

**Labor Law—Labor Management Relations Act—Unfair Labor Practices —Breach of the Duty of Fair Representation.—*Local 12, United Rubber Workers v. NLRB.*[1]**—Petitioner, Local 12, was the exclusive bargaining representative of all the employees at an Alabama Goodyear plant. Although the bargaining contract negotiated and administered by Local 12 appeared to provide otherwise, separate seniority rolls were maintained for White and Negro employees, and, as a result, Negro employees had no greater rights than White employees with less seniority. In addition, although not prescribed by the contract, racially separate plant facilities were maintained. In the Fall of 1961, a Negro employee was laid off even though a White employee with less seniority was being retained. As a result of this action, he and seven other Negroes, who were also in layoff status, appeared before the union grievance committee and demanded reinstatement with back pay, transfer privileges as provided in the contract, and desegregation of plant facilities. The committee rejected their claims, and the complainants appealed to the International President of the union, who reversed the local's refusal to process the grievances. Local 12 then obtained an agreement from the company dissolving the separate seniority rolls, but it continued in its refusal to process the grievances concerning back pay and segregated plant facilities. Consequently, the complainants filed unfair-labor-practice charges against Local 12.

Reversing the trial examiner, the National Labor Relations Board ruled[2] that, by refusing to process these grievances, Local 12 had not only violated Sections 8(b)(2) and (3) of the Taft-Hartley Act,[3] but had also violated section 8(b)(1)(A) by restraining or coercing complainants in their section 7 right to be represented "without invidious discrimination."[4] Local 12

[53] American Potash & Chem. Corp., supra note 37, at 1423.

[54] Certiori has recently been denied in the principal case. 35 U.S.L. Week 3330 (U.S. March 21, 1967).

[1] 368 F.2d 12 (5th Cir. 1966).

[2] Local 12, United Rubber Workers, 150 N.L.R.B. 312 (1964).

[3] 61 Stat. 141 (1947), 29 U.S.C. §§ 158(b)(2), (3) (1964). The violations of these sections are not discussed by the court, and thus are not subjects of this note.

[4] 150 N.L.R.B. at 315. LMRA § 7, 61 Stat. 140 (1947), 29 U.S.C. § 157 (1964) provides that

> employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . .

petitioned the Fifth Circuit Court of Appeals for a review of the Board's decision. HELD: Enforcement granted. The court found: (1) that Local 12's refusal to process the grievances was a breach of its duty of fair representation[5] implicit in Section 9 of the Taft-Hartley Act;[6] (2) that the right to such representation is an integral part of the employees' section 7 right "to bargain collectively through representatives of their own choosing";[7] and (3) that Local 12, in failing to represent complainants fairly, had committed an unfair labor practice under section 8(b)(1)(A).[8]

The substantive holding of the Fifth Circuit is of paramount importance in that it gives appellate approval to a novel approach, previously set forth by the Board in a number of rulings,[9] to the problem of remedying discriminatory practices by labor organizations against members of the bargaining unit. In examining the rationale of this approach, it is important to note that the conduct of a union is not within the remedial jurisdiction of the Board unless such conduct can be characterized as an unfair labor practice under one of the section 8(b) provisions of the Taft-Hartley Act.[10] It is evident from the broad language of section 8(b)(1)(A) that, in order to determine whether there has been a violation of that section, the extent of section 7's coverage must first be ascertained, including the scope of the employees' right "to bargain collectively through representatives of their own choosing." Under the rationale of the instant case, it is reasoned that the full extent of the right to bargain collectively cannot be ascertained without reference to the duties owed to the employees by the representing union.[11] Since section 9 of the act imposes upon the union, as exclusive representative, the implicit *duty* of fair representation, it follows, under the

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LMRA § 8(b)(1)(A), 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(1)(A) (1964) provides that "it shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 . . . ."

[5] 368 F.2d at 19.

[6] Humphrey v. Moore, 375 U.S. 335 (1964); Syres v. Oil Workers Int'l Union, 350 U.S. 892 (1955); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Wallace Corp. v. NLRB, 323 U.S. 248 (1944). LMRA § 9(a), 61 Stat. 143 (1947), 29 U.S.C. § 159(a) (1964) provides that

> representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of collective-bargaining contract or agreement then in effect . . . .

[7] 368 F.2d at 17.

[8] Id. at 17, 20.

[9] Automobile Workers, 149 N.L.R.B. 482 (1964); Local 1367, Int'l Longshoremens Union, 148 N.L.R.B. 897 (1964), enforced per curiam, 368 F.2d 1010 (5th Cir. 1966); Independent Metal Workers, 147 N.L.R.B. 1573 (1964); Miranda Fuel Co., 140 N.L.R.B. 181 (1962), enforcement denied, 326 F.2d 172 (2d Cir. 1963).

[10] LMRA § 8(b), 61 Stat. 141 (1947), 29 U.S.C. § 158(b) (1964).

[11] See Comment, Federal Protection of Individual Rights Under Labor Contracts, 73 Yale L.J. 1215, 1235-37 (1964).

logic of this case, that section 7 encompasses the employees' correlative *right* to be represented fairly. Consequently, reading the section 9 duty of fairness as an integral part of the employees' section 7 right, it is concluded that a breach of the duty by the bargaining representative is an unfair labor practice within the remedial jurisdiction of the Board under section 8(b)(1)(A).

The appellate decision in the *Local 12* case is of further importance in that it is inconsistent with *NLRB v. Miranda Fuel Co.*[12] In that case, the Second Circuit Court of Appeals denied enforcement to a Board order[13] which held that the reduction of an employee on the seniority list because of "irrelevant, invidious, or unfair"[14] considerations constituted a violation of section 8(b)(1)(A). Although the *Miranda* decision cannot be considered an outright rejection of the rationale adopted in the instant case,[15] it does create enough inconsistency to raise a strong possibility that the issue will be presented for Supreme Court determination.

The *Local 12* holding is also noteworthy because of the problem of conflicting remedies that will inevitably occur. Historically, redress for a breach of the duty of fair representation has been within the jurisdiction of the state[16] and federal courts.[17] However, if the *Local 12* decision receives substantial acceptance, the courts will be relieved of much of their original jurisdiction over unfair representation cases. This conclusion is based on the ruling of *San Diego Bldg. Trades Council v. Garmon*[18] that "when an activity is arguably subject to section 7 or section 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board . . . ."[19] The extent of this exclusive jurisdiction over unfair representation cases will be extremely difficult to determine, however, due to the inconclusive scope of two apparent exceptions to the *Garmon* preemption doctrine. First, it is recognized that a suit based on the collective-bargaining agreement may be maintained against an employer, and, possibly, against a labor organization as joint defendant,[20] under Section 301 of the Taft-Hartley Act,[21] regardless of

[12] 326 F.2d 172 (2d Cir. 1963).

[13] Miranda Fuel Co., supra note 9. Although the decision of the Board was on a vote of 3-2, the two dissenting members did not challenge the crucial premise of the majority that the duty of fair representation was to be read as a correlative § 7 right.

[14] Id. at 185.

[15] Of the three judges, only Judge Medina seems to have clearly rejected the Board's finding that the action of the union constituted a violation of § 8(b)(1)(A). Judge Lumbard, concurring, specifically refrained from deciding the § 8(b)(1)(A) issue, and Judge Friendly, dissenting, based his decision on a finding of a § 8(b)(2) violation and did not consider the § 8(b)(1)(A) issue.

[16] E.g., Betts v. Easley, 161 Kan. 459, 169 P.2d 831 (1946); Wilson v. Ex-Cell-O Corp., 368 Mich. 61, 117 N.W.2d 184 (1962).

[17] E.g., Ferro v. Railway Express Agency, Inc., 296 F.2d 847 (2d Cir. 1961); Union News Co. v. Hildreth, 295 F.2d 658 (6th Cir. 1961).

[18] 359 U.S. 236 (1959).

[19] Id. at 245.

[20] Humphrey v. Moore, supra note 6.

[21] 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1964) provides that "suits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States having jurisdiction of the parties . . . ."

whether the basis of the action may also "arguably" be an unfair labor practice.[22] However, a recent Supreme Court ruling appears to have extended this "contract" exception to certain actions brought against the union alone, thus adding to the difficulty in determining the extent of the preemption doctrine.[23]

As a second exception, the scope of the *Garmon* doctrine may be limited by the subsequently enacted Title VII of the Civil Rights Act of 1964.[24] This act forbids as an "unlawful labor practice" discrimination by a labor organization on the basis of race, religion, sex, or national origin,[25] and gives jurisdiction to an Equal Employment Opportunity Commission. Thus, where a particular discriminatory act by a labor organization may be reasonably characterized as either an "unlawful labor practice" under Title VII or a breach of the duty of fair representation and, therefore, an unfair labor practice under the rationale of the instant case, a definite conflict of remedial jurisdiction will occur. However, since Congress obviously intended to place such acts either exclusively within the remedial procedure of the EEOC, or concurrently under the jurisdiction of the NLRB,[26] it is inevitable that the Board's *exclusive* jurisdiction over such unfair representation cases will be significantly qualified once the provisions of Title VII are enforced.

In view of the novelty of the Board's approach, the conflict of *Local 12* with *Miranda*, and the jurisdictional difficulties that will be presented, it is of utmost importance to carefully evaluate the holding of the instant case. In making such a determination, one must look to the legislative history and congressional intent concerning the scope of the Board's jurisdiction, as well as to the statutory language of the governing acts. Furthermore, these factors must be viewed in the context of a changing national

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[22] Smith v. Evening News Ass'n, 371 U.S. 195 (1962).

[23] Vaca v. Sipes, 35 U.S.L. Week 4213 (U.S. Feb. 27, 1967). Mr. Justice White, speaking for the majority, in a strained and unclear opinion, upheld the jurisdiction of the state of Missouri over a suit by an employee against a labor organization for its failure to process a grievance to arbitration. Labeling the action as one founded on contract, he based his opinion on an extension of the scope of § 301 to suits by employees directly against the labor organization. Mr. Justice Fortas, joined by the Chief Justice and Mr. Justice Harlan, concurred in the result, adopting the view that the basis of the claim was a breach of the union's duty of fair representation rather than a breach of the bargaining contract. He concluded that the action was, thus, an unfair labor practice claim within the exclusive jurisdiction of the NLRB and not subject to the jurisdiction of the state of Missouri.

[24] 78 Stat. 241, 42 U.S.C. §§ 2000a to h-6 (1964).

[25] 78 Stat. 255, 42 U.S.C. § 2000e-2(c) (1964).

[26] Although the contention that Title VII jurisdiction is exclusive has received some support, see Sherman, Union's Duty of Fair Representation and the Civil Rights Act of 1964, 49 Minn. L. Rev. 771, 805-20 (1965), a conclusion of concurrent jurisdiction has the support of both statutory language and legislative history. 78 Stat. 268, 42 U.S.C. § 2000h-3 (1964) provides that nothing contained in the act shall be construed to "affect any right or authority . . . of the United States or any agency . . . thereof under existing law to institute or intervene in any action or proceeding." In addition, the Senate rejected an amendment that would have rendered the provisions of Title VII exclusive with respect to all claims arising under it. See 110 Cong. Rec. 11719 (1964).

labor policy based on developments in social and economic conditions and beliefs.

In opposition to the substantive holding of the instant case, it has been argued that legislative history supports neither an incorporation of the section 9 duty of fair representation into section 7, nor an identification of a breach of the duty as an unfair labor practice. Specifically, it has been pointed out that in 1935, when sections 7 and 9 were first enacted, Congress was concerned exclusively with protecting employees from hostile employers,[27] and that it was not until 1947, with the enactment of the Taft-Hartley Act, that the conduct of unions was brought within the jurisdiction of the NLRB.[28] At that time, it had been three years since *Steele v. Louisville & N.R.R.*,[29] which recognized that a union certified under the Railway Labor Act has a statutory duty "to exercise fairly the power conferred upon it in behalf of all those for whom it acts without hostile discrimination against them,"[30] and *Wallace Corp. v. NLRB*,[31] which held the duty of fair representation to be implicit in section 9 of the NLRA. Thus, even after judicial recognition of the duty of fair representation, Congress, in 1947, did not change section 7, nor did it take any other affirmative action to make the breach of the duty an unfair labor practice.[32]

Again, in 1953, Congress had an opportunity to take such affirmative action, but instead, it dismissed a proposal to make *racial* discrimination an unfair labor practice.[33] Subsequently, in 1959, with the enactment of the Landrum-Griffin Act,[34] Congress remained silent on the issue of unfair representation as an unfair labor practice. Finally, when Congress was considering the Civil Rights Act of 1964, it rejected another opportunity to specifically address itself to this issue.[35]

On the basis of this history of congressional inaction, it has been argued that Congress has manifested an intent to exclude the breach of the duty of fair representation from the cognizance of the unfair labor practice provisions of the Taft-Hartley Act.[36] If this is an accurate reading of the congressional history, it would seem clear that the holding of the instant case is incorrect.

An examination of the circumstances surrounding the relevant congressional proposals reveals, however, that many of the adverse legislative-

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[27] See Blumrosen, The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship, 61 Mich. L. Rev. 1435 (1963).

[28] In § 8(b) of the Taft-Hartley Act, Congress made certain activities of the union unfair labor practices within the remedial jurisdiction of the NLRB. 61 Stat. 141 (1947), 29 U.S.C. § 158(b) (1964).

[29] 323 U.S. 192 (1944).

[30] Id. at 203.

[31] 323 U.S. 248 (1944).

[32] Comment, Racial Discrimination and the Duty of Fair Representation, 65 Colum. L. Rev. 273, 274 (1965).

[33] Sherman, supra note 26, at 808.

[34] Labor-Management Reporting and Disclosure Act, 73 Stat. 519 (1959), 29 U.S.C. §§ 401-531 (1964).

[35] Sherman, supra note 26, at 808.

[36] NLRB v. Miranda Fuel Co., supra note 12, at 178.

history arguments are without substance. The 1953 proposal to make racial discrimination an unfair labor practice was never reported out of committee,[37] and thus cannot properly be considered a reflection of congressional intent. In 1959, furthermore, when Congress was considering the Landrum-Griffin Act, its primary concern was with the internal affairs of unions and was based on a premise of separating the internal affairs from the collective-bargaining process.[38] Therefore, since unfair representation claims basically arise out of the negotiation and administration stages of the collective-bargaining process, congressional silence at that time cannot be considered a valid indication of the sense of Congress on this issue. Finally, in 1964, the proposal by Senator Prouty to make racial discrimination an unfair labor practice was intended as a *complete substitute* for Title VII of the Civil Rights Act of 1964,[39] and thus cannot realistically be construed as rejected on its merits.

It is apparent, then, that the legislative history is inconclusive and that arguments based upon it are, at best, unpersuasive. In this respect, it is submitted that congressional silence is not determinative in interpreting the various sections of the Taft-Hartley Act. Specifically, although Congress has not affirmatively indicated an intent to make a violation of the duty of fair representation an unfair labor practice, neither did it clearly manifest an intent to create such a duty under section 9 of the act. Nevertheless, such a duty has been found.[40] Furthermore, the fact that the relationship of labor and management is a contemporary and changing problem of such magnitude as to be susceptible of legal development on all fronts—judicial, administrative, and legislative[41]—lends further support to the holding of *Local 12*. Although the primary purpose of the enactment of the National Labor Relations Act may have been to facilitate the collective-bargaining process between employers and labor organizations, subsequent labor policy has reflected a growing recognition that union strength may be exercised to the detriment of members of the represented bargaining unit. Such recognition is indicated by the fact that all significant labor legislation in the last twenty years has been extensively directed at the protection of the individual employee. This legislation has included: (1) the Taft-Hartley Act of 1947, which provides for the identification of various acts of labor organizations as unfair labor practices,[42] allows individual presentation of grievances under certain circumstances,[43] and provides for the institution in the courts of suits based on the collective-bargaining contract;[44] (2) the Landrum-Griffin Act of 1959, which protects employees in regard to the internal affairs of the union;[45] and (3) Title VII of the Civil Rights

[37] 99 Cong. Rec. 4437 (1953).
[38] Blumrosen, supra note 27, at 1474.
[39] 110 Cong. Rec. 10360-61 (1964).
[40] See authorities cited note 6 supra.
[41] Blumrosen, supra note 27, at 1438.
[42] 61 Stat. 141 (1947), 29 U.S.C. § 158(b) (1964).
[43] 61 Stat. 142 (1947), 29 U.S.C. § 159(a) (1964).
[44] 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1964).
[45] 73 Stat. 519 (1959), 29 U.S.C. §§ 401-531 (1964).

Act of 1964, which protects individuals against union discrimination on the basis of race, religion, sex, and national origin.[46] These enactments make it abundantly clear that the protection of the employee from detrimental union action has been a dominant characteristic of congressional labor policy.

Given this pattern in the development of the national labor policy, the rationale of *Local 12* is certainly substantiated by the language of the act itself. A broad scope of authority for the Board is indicated by the purpose clause of section 1, which states in part that "it is the purpose and policy of this act . . . to protect the rights of individual employees in their relations with labor organizations . . . ."[47] The breadth of this power received judicial recognition in the *Garmon* case, where the Supreme Court stated that "the unifying consideration of our decisions has been regard to the fact that Congress has entrusted administration of the labor policy of our Nation to a centralized administrative agency, armed with its own procedures, and equipped with specialized knowledge and cumulative experience . . . ."[48] Keeping in mind this broad scope of authority, the interpretation of *Local 12* is perfectly consonant with the language of sections 7 and 9. By section 7, employees are guaranteed the right to "bargain collectively through representatives of their own choosing." Since these representatives, selected by a majority of the employees, are the exclusive representatives of all the members of the bargaining unit,[49] the right guaranteed by section 7 would be virtually meaningless if certified representatives could act or refuse to act in behalf of particular employees on unfair or arbitrary grounds. Since it must be assumed that Congress would not intend to create a potentially meaningless right, it is difficult to avoid a finding that such right must be protected by an obligation of fair representation. Thus, it is within the logic and spirit of the act to conclude that the employees' section 7 right includes the right to *fair* representation, and that such right is guaranteed by designating the breach of the duty of fair representation as an unfair labor practice under section 8(b)(1)(A).

The *Local 12* rationale is, moreover, not only legally supportable but also highly desirable in view of the many advantages that the jurisdiction of the Board will open to the employee asserting an unfair representation claim. Most importantly, this decision will provide complainants alleging a breach of the duty of fair representation unprecedented accessibility to a "free" tribunal, since, under Board procedure, an individual complainant is not required to pay any litigation expenses, with the exception of expenses for appeal if his charges are dismissed.[50] The NLRB, moreover, dealing exclusively with problems of labor law, possesses the advantage of special competence and expertise in dealing with problems concerning the col-

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[46] 78 Stat. 255, 42 U.S.C. § 2000e-2c (1964).

[47] 61 Stat. 136 (1947), 29 U.S.C. § 141(b) (1964).

[48] San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 242 (1959).

[49] LMRA § 9(a), 61 Stat. 142 (1947), 29 U.S.C. § 159(a) (1964).

[50] Comment, Refusal to Process a Grievance, the NLRB, and the Duty of Fair Representation: A Plea for Preemption, 26 U. Pitt. L. Rev. 593, 618 (1965).

lective-bargaining process.[51] In addition, the NLRB has a broad power of investigation and the authority and ability to urge, through the regional director, informal settlements of grievances and to provide expeditious hearings.[52] Furthermore, besides these administrative advantages, the Board, as a single agency, would be more effective than geographically scattered and ideologically diverse courts in establishing workable, consistent standards of fair representation.[53] Thus, it is evident that legislative history, national labor policy, statutory language, and jurisdictional desirability all support the holding of *Local 12* that the duty of fair representation implicit in section 9 is reflected by a correlative right in section 7, thereby making a breach of that duty an unfair labor practice under section 8(b)(1)(A).

JOHN J. REID

**Labor Law—Railway Labor Act—Norris-LaGuardia Act—Injunction Against Secondary Labor Boycott.—*Brotherhood of R.R. Trainmen v. Atlantic Coast Line R.R.*[1]**—The Florida East Coast Railway (FEC), the Atlantic Coast Line Railroad (ACL), the Seaboard Air Line Railroad (SAL), and the Southern Railway each owned twenty-five per cent of the stock of the Jacksonville Terminal Company, a Florida corporation. Under contracts called "Operating and Guaranty Agreements," the Terminal Company provided certain services and facilities to the four stockholding railroads as well as to the Georgia Southern and Florida Railway.[2] In anticipation of a strike against it by the Brotherhood of Railroad Trainmen, FEC obtained an injunction against the Terminal Company and the other three stockholding railroads, requiring them to perform the terms of the "Operating and Guaranty Agreements."[3]

The Brotherhood struck FEC after the exhaustion of the statutory procedures for the peaceful settlement of disputes, at which point neither party had any recourse under the Railway Labor Act (RLA).[4] The union

[51] See Wellington, Union Democracy and Fair Representation: Federal Responsibility in a Federal System, 67 Yale L.J. 1327, 1358-59 (1958).

[52] Blumrosen, supra note 27, at 1514.

[53] Cox, The Duty of Fair Representation, 2 Vill. L. Rev. 151, 173 (1957).

[1] 362 F.2d 649 (5th Cir.), aff'd, 385 U.S. 20 (1966).

[2] These services and facilities included, for example, freight interchange, track maintenance, switching and repair services, and "car service" as defined by the Interstate Commerce Act, 40 Stat. 101 (1917), as amended, 49 U.S.C. § 1(10) (1964). 362 F.2d at 650.

[3] No opinion was published in that case.

> Although the lower court's order specifically purported to bind the employees of both the defendant Terminal Company and the Railroad defendants, the court denied an application by the union representatives of said employees to intervene in an attempt to dissolve this injunction . . . . It was not appealed, since the brotherhoods were not permitted to intervene, and thus there was no aggrieved party.

Id. at 651.

[4] 44 Stat. 577 (1926), as amended, 45 U.S.C. §§ 151-63 (1964). For the history of this dispute between FEC and its employees, see Florida E.C. Ry. v. United States,